

Supreme Court, U.S.

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No. 91-1306

In The  
**Supreme Court of the United States**  
October Term, 1991

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UNITED STATES OF AMERICA,

*Petitioner,*

v.

GUY W. OLANO, JR., and RAYMOND M. GRAY

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Petition For A Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit

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**RESPONDENT GRAY'S BRIEF IN OPPOSITION**

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## TABLE OF CONTENTS

	<b>Page</b>
<b>INTRODUCTION.....</b>	<b>1</b>
<b>PROCEDURAL HISTORY.....</b>	<b>3</b>
<b>ARGUMENT .....</b>	<b>6</b>
I. THE GOVERNMENT NEVER REQUESTED THE COURT OF APPEALS TO STAY THE ISSUANCE OF THE MANDATE; AS A RESULT, THE MANDATE AND ORDER FOR A NEW TRIAL, WHICH CONSTITUTES THE FINAL JUDGMENT, WAS ISSUED BY THE COURT OF APPEALS AND RECEIVED BY THE DISTRICT COURT; ANY FURTHER APPELLATE REVIEW IS THUS MOOT .....	6
II. THE CENTRAL FACTUAL PREMISE OF THE GOVERNMENT'S PETITION - THAT THE DEFENDANTS DID NOT OBJECT AND THAT THEIR ATTORNEYS, IN FACT, CONSENTED TO THE ALTERNATE JUROR ERROR - IS NOT CONSISTENT WITH THE RECORD BECAUSE MR. GRAY'S ATTORNEY SPECIFICALLY OBJECTED TO THE PROCEDURE .....	8
A. The Government's Arguments As To Why Review Should Be Granted Rest On The Assumption That There Was No Objection To The Alternate Juror Deliberation Error By The Defendants And That The Defendants' Attorneys Consented To The Erroneous Procedure.....	8
B. Mr. Gray's Attorney Specifically Objected To The Alternate Jurors Being Allowed In The Jury Room During The Deliberations.....	10
III. THE GOVERNMENT'S CLAIMED CONFLICT AMONG THE CIRCUITS IS ILLUSORY .....	12

## TABLE OF CONTENTS - Continued

	Page
A. The Types of Rule 24(c) Errors .....	12
B. There Is No Conflict Among The Circuits Once The Cases Are Examined According To The Type Of Rule 24(c) Error .....	14
IV. THE COURT OF APPEALS' DECISION TO REVERSE WITHOUT REQUIRING THE DEFENDANTS TO PROVE ACTUAL PREJU- DICE WAS CORRECT; THE DECISION IS CON- SISTENT WITH THE PRINCIPLE THAT A DEFENDANT SHOULD NOT BE REQUIRED TO SHOW PREJUDICE WHERE THE NATURE OF THE ERROR MAKES SUCH A SHOWING IMPOSSIBLE.....	16
A. The Error Requiring Reversal Without A Showing Of Prejudice Was Not A Violation Of The "Rule of 12" But A Violation Of The Privacy And Secrecy Of The Deliberating Jurors .....	17
B. The Nature Of The Error Makes It Impossi- ble To Prove Prejudice And Therefore The Court Of Appeals Decision To Reverse With- out Requiring The Defendants To Establish Prejudice Is Appropriate And Consistent With The Decisions Of This Court .....	18

## TABLE OF CONTENTS - Continued

	Page
V. THE COURT OF APPEALS CORRECTLY RULED THAT PERSONAL CONSENT OF THE DEFENDANT IS REQUIRED TO WAIVE THE RIGHT TO A JURY FREE FROM OUTSIDE INFLUENCE; PERSONAL CONSENT BY THE DEFENDANT SHOULD BE REQUIRED BECAUSE THERE IS NO POSSIBLE TACTICAL REASON FOR GIVING UP THE RIGHT AND IT IS SIMILAR TO OTHER RIGHTS WHICH CAN ONLY BE WAIVED BY PERSONAL CONSENT OF THE DEFENDANT .....	20
CONCLUSION .....	24

## TABLE OF AUTHORITIES

## Page

CASES	
<i>Cuyler v. Sullivan</i> , 446 U.S. 335 (1980) .....	20
<i>Leser v. United States</i> , 358 F.2d 313 (9th Cir.), <i>petition for cert. dismissed</i> 385 U.S. 802 (1966) .....	13
<i>McNally v. United States</i> , 863 U.S. 677 (1987) .....	4, 5
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984) .....	20
<i>Tanner v. United States</i> , 483 U.S. 107 (1987) .....	19
<i>United States v. Allison</i> , 481 F.2d 468 (5th Cir. 1973) ....	22
<i>United States v. Beasley</i> , 464 F.2d at 469.....	13
<i>United States v. Crooks</i> , 826 F.2d 4 (9th Cir. 1987) .....	7
<i>United States v. Guerrero-Peralta</i> , 446 F.2d 876 (9th Cir. 1971) .....	23
<i>United States v. Hilling</i> , 863 F.2d 677 (9th Cir. 1988) .....	4
<i>United States v. Jones</i> , 763 F.2d 518 (2d Cir.) <i>cert. denied</i> , 474 U.S. 981 (1985) .....	15
<i>United States v. Kaminski</i> , 692 F.2d 505 (8th Cir. 1982).....	13, 14
<i>United States v. Lamb</i> , 529 F.2d 1153 (9th Cir. 1975) .	13, 19
<i>United States v. Phillips</i> , 664 F.2d 971 (5th Cir. 1981) .	13, 14
<i>United States v. Reed</i> , 790 F.2d 208 (2d Cir.) <i>cert. denied</i> , 479 U.S. 954 (1986) .....	13, 14
<i>United States v. Reyes</i> , 603 F.2d 69 (9th Cir. 1979) ....	23
<i>United States v. Rubio</i> , 727 F.2d 786 (9th Cir. 1983) .	13, 15
<i>United States v. Taylor</i> , 498 F.2d 390 (6th Cir. 1974) ....	23

## TABLE OF AUTHORITIES - Continued

## Page

<i>United States v. Vasquez</i> , 597 F.2d 192 (9th Cir. 1979).....	20
<i>United States v. Villamonte-Marquez</i> , 462 U.S. 579 (1983) .....	8
<i>United States v. Virginia Erection Corp.</i> , 335 F.2d 868 (4th Cir. 1964) .....	17, 18, 19
<i>United States v. Watson</i> , 669 F.2d 1374 (11th Cir. 1982).....	13, 15
<i>York International Builders, Inc. v. Chaney</i> , 527 F.2d 1061 (9th Cir. 1975) .....	7
STATUTES AND RULES	
18 U.S.C. section 3161(e).....	7
Federal Rule of Appellate Procedure	
Rule 41(a) .....	7
Rule 41(b) .....	1, 7, 8
Federal Rules of Criminal Procedure	
Rule 23(b) .....	18, 19, 23
Rule 24(c) .....	<i>passim</i>

## INTRODUCTION

Raymond M. Gray, by his attorney, hereby responds to the Solicitor General's petition asking this Court to review the decision of the Ninth Circuit Court of Appeals reversing his conviction and ordering a retrial. The petition should be denied for a number of reasons.

First, any further appellate review of the court of appeals' decision is moot. The government failed to comply with the Federal Rules of Appellate Procedure and never asked the court of appeals to stay the issuance of the mandate. *See Fed. R. App. P. 41(b)*. As a result, the mandate ordering a new trial, which constitutes final judgment, has issued and has been received by the district court. Section I, *infra*.

Second, the factual assumptions made by the government in requesting review are not supported by the record. The "question presented" as stated by the government's petition, rests on the factual premise that the defendants did not object, and in fact consented, to allowing the alternate jurors in the jury room during deliberations. *See Government's Petition For A Writ of Certiorari at (I) (hereafter "Gov't. Pet. at xx")*. That factual premise is not supported by the record, at least not with respect to Mr. Gray. Mr. Gray's attorney, on the only occasion he addressed the alternate juror issue, specifically requested the district court *not* allow the alternates in the jury room during deliberations. While an attorney for a co-defendant did later apparently consent to the procedure, there is no indication in the record that this attorney was acting on behalf of Mr. Gray or, even if the attorney thought he

was, that he had been authorized to do so. Section II, *infra*.

Third, the conflict claimed to exist among the circuits in the government's petition is illusory. There only appears to be a conflict because the government lumps together all cases deciding Rule 24(c), Fed. R. Crim. P., issues as if all Rule 24(c) errors were the same. They are not; in fact, the cases cited by the government illustrate and resolve distinctly different types of Rule 24(c) errors. When the cases said to be in conflict are examined according to the particular type of Rule 24(c) error presented, the supposed conflict disappears. Section III, *infra*.

Fourth, contrary to the protestations of the government, the court of appeals' decision that the Rule 24(c) error in this case warranted reversal without a showing of prejudice is not in conflict with this Court's decisions on prejudice or waiver. In arguing that the court of appeals erred by reversing without requiring proof of prejudice, the government incorrectly characterizes the error in this case as one involving jury size (the "rule of 12"). The error here was not a violation of the rule of 12; the error was an intrusion on the privacy and secrecy of those persons who must vote a defendant's fate. As such, the likelihood of prejudice is great, but the ability of a defendant to prove prejudice is nearly impossible. As this Court has recognized, when the potential prejudice from an error is great, but the nature of the error makes proof of prejudice difficult, it is appropriate to dispense with the need for proof of actual prejudice. Section IV, *infra*.

Similarly, the supposed conflict with this Court's personal waiver decisions is also manufactured. The government relies on general waiver cases and broad statements of the law without any reference to the source or nature of the error in this case. What occurred here was a violation of a mandatory provision of a Federal Rule of Criminal Procedure which, by its own terms, does not permit anyone to waive its provisions or consent to its violation. Under those circumstances, where there is no lawful basis for a waiver and no possible tactical reason for doing so, a personal waiver of the defendant should be required. The court of appeals, in ruling that a personal waiver was required under these circumstances, did not act contrary to this Court's decisions. Section V, *infra*.

Finally, the error ridden history of this prosecution, as illustrated in the procedural history section below, strongly counsels against the granting of certiorari on the issue requested by the government. This prosecution was ill-conceived from the outset and the errors have multiplied ever since. The government's attempt to salvage its dubious trial victory is likely to be without purpose as the court of appeals itself noted that the appeal raised additional substantial issues (which the court found unnecessary to reach) that will inevitably result in a reversal and new trial, regardless of any decision by this Court on the issue raised in the government's petition.

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#### PROCEDURAL HISTORY

A superseding indictment issued December 8, 1986, by a grand jury in the Western District of Washington,

named Raymond M. Gray and eight other persons as defendants. The indictment was 63 pages in length and contained 17 counts; Mr. Gray was named in eight of the counts (one conspiracy count and seven substantive counts). In a remarkable example of venue shopping, the indictment was returned in the Western District of Washington (Seattle) even though none of the defendants resided in that jurisdiction.<sup>1</sup>

Two defendants were severed and tried separately. Mr. Gray and the other six defendants tried with him, endured a three and a half month trial, all but a few days of which consisted of the government's presentation of its case. At the conclusion of its deliberations, the jury acquitted three defendants on all counts (Ascani, Kalterman and Marler), acquitted two defendants on all counts except the conspiracy count (Hilling and Neubauer) and convicted two defendants on all counts (Gray and Olano, the two bank presidents).

The direct appeal of co-defendants Hilling and Neubauer's appeal was heard separately. The court of appeals reversed their convictions because count I, the conspiracy count, improperly alleged an "intangible rights" fraud in violation of this Court's decision in *McNally v. United States*, 863 U.S. 677 (1987). See *United States v. Hilling*, 863 F.2d 677 (9th Cir. 1988). After the case was remanded, the government dismissed the indictment against both Hilling and Neubauer.

<sup>1</sup> The charges in the indictment centered around the alleged defrauding of three savings and loan institutions, one of which (Home Savings and Loan) had its main office in Seattle.

Mr. Gray's direct appeal resulted in his acquittal on three counts; the court of appeals found that despite having three and a half months to do so, the government had failed to present evidence that was legally sufficient to support a conviction on counts V, VI and VII. Similarly, the court of appeals ordered Mr. Olano acquitted of two counts.<sup>2</sup>

Mr. Gray and Mr. Olano raised numerous other issues in their direct appeals. For example, Mr. Gray maintained that the same *McNally* error that required reversal of the convictions of Hilling and Neubauer also required reversal of his convictions on counts one and two, as those counts contained the "intangible rights" theory of fraud held to be invalid under *McNally* in the earlier appeal of Hilling and Neubauer. Mr. Gray also argued that the *McNally* error in the conspiracy count (count I) required reversal of his convictions on all the remaining counts. This is because the trial court instructed the jury on a "Pinkerton" theory of liability, which permitted the jury to convict Mr. Gray of all of the substantive counts of the indictment based solely on the invalid *McNally* conspiracy count.

It was also argued that reversal was required on all counts because, in a seemingly unprecedented instance, one of the jurors was inexcusably absent during an afternoon of the trial but yet the district court allowed the trial

<sup>2</sup> The government does not seek review of the court of appeals' order directing Mr. Gray's or Mr. Olano's acquittal on these counts, nor did the government raise this issue in its petition for rehearing with the court of appeals. See Gov't Pet. at 5, n.1.

to continue. Still further legal and evidentiary claims were raised by Gray and Olano.

The court of appeals, while recognizing that these claims were properly characterized as "substantial issues," found it unnecessary to address them because of its ruling on the Rule 24(c) – jury deliberation error. As noted in the government's petition, the court of appeals, after finding the government's evidence legally insufficient on three counts against Mr. Gray and two counts against Mr. Olano, reversed their conviction on all the remaining counts because the alternate jurors were not discharged when deliberations began (as is made mandatory by Rule 24(c)), and the alternate jurors were then allowed in the jury room during deliberations.<sup>3</sup> See Pet. App. at 3a, n.3.

## ARGUMENT

### I. THE GOVERNMENT NEVER REQUESTED THE COURT OF APPEALS TO STAY THE ISSUANCE OF THE MANDATE; AS A RESULT, THE MANDATE AND ORDER FOR A NEW TRIAL, WHICH CONSTITUTES THE FINAL JUDGMENT, WAS ISSUED BY THE COURT OF APPEALS AND RECEIVED BY THE DISTRICT COURT; ANY FURTHER APPELLATE REVIEW IS THUS MOOT

The court of appeals' decision reversing the defendants' convictions was issued May 31, 1991. The

government's petition for rehearing, with a suggestion for rehearing *en banc*, was denied October 18, 1991. The Federal Rules of Appellate Procedure provide that the mandate of the court of appeals shall issue within 7 days of that date. *See Fed. R. App. P. 41(a)*. Where a party seeks, or intends to seek, review by this Court, Rule 41 provides that the party can ask the court of appeals to stay the issuance of the mandate. *See Rule 41(b)*. The government here did not comply with Rule 41(b) and never asked the court of appeals to stay issuance of the mandate; as a result, the mandate was issued by the court of appeals and received by the district court on or about December 10, 1991.

The issuance of the mandate constituted final judgment. *See York International Builders, Inc. v. Chaney*, 527 F.2d 1061, 1066 (9th Cir. 1975). Further, once the mandate ordering a new trial was received by the district court, the time limitations of the Speedy Trial Act were put into effect. *See United States v. Crooks*, 826 F.2d 4, 5 (9th Cir. 1987); 18 U.S.C. section 3161(e).

In January, 1992, after the mandate had been received and the Speedy Trial clock had begun to run, the government filed a motion with the district court seeking a stay of the proceedings pending its petition for a writ of certiorari to this Court.<sup>4</sup> The district court granted the stay. Even assuming the speedy trial time limit has been

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<sup>3</sup> Thus, even if the government were successful in this Court on the alternate juror issue, on remand the Court of Appeals would then need to address the other "substantial issues" raised by Mr. Gray and Mr. Olano.

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<sup>4</sup> Curiously, the government's motion for a stay included a request that the stay apply to defendants Hilling and Neubauer, even though there were no proceedings against either of them; the government had previously voluntarily dismissed the indictment against them after their convictions had been reversed on appeal.

tolled by the district court stay, the fact remains that the mandate and final judgment has been issued by the court of appeals and received by the district court. Since the government allowed the judgment to become final, that final judgment should be honored. To rule otherwise would make Rule 41(b) meaningless. Thus, the government's present attempt to have the order for a new trial reversed and vacated is moot.<sup>5</sup>

## **II. THE CENTRAL FACTUAL PREMISE OF THE GOVERNMENT'S PETITION – THAT THE DEFENDANTS DID NOT OBJECT AND THAT THEIR ATTORNEYS, IN FACT, CONSENTED TO THE ALTERNATE JUROR DELIBERATION ERROR – IS NOT CONSISTENT WITH THE RECORD BECAUSE MR. GRAY'S ATTORNEY SPECIFICALLY OBJECTED TO THE PROCEDURE**

### **A. *The Government's Arguments As To Why Review Should Be Granted Rest On The Assumption That There Was No Objection To The Alternate Juror Error By The Defendants And That The Defendants' Attorneys Consented To The Erroneous Procedure***

The government's petition states that the issue presented is "[w]hether allowing alternate jurors to be

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<sup>5</sup> In footnote 2 of the opinion in *United States v. Villamonte-Marquez*, 462 U.S. 579, 582, n.2 (1983), the Court rejected an argument that the issuance of the mandate rendered further review by this Court moot. *Villamonte-Marquez* is distinguishable, however, since in that case the government had dismissed the underlying indictment. With the indictment dismissed, there was no district court proceeding to which the mandate could apply.

present during jury deliberations is automatic reversible error, even when the defense consents to that procedure." Gov't Pet. at (I) (emphasis added). As the government's statement of the issue suggests, its request for review – and its disagreement with the court of appeals' decision – rests on the assumption that there was no objection by the defendants to the Rule 24(c) error and that defense counsel, in fact, consented to the error.

Thus, the government argues that review should be granted because "[r]espondents failed to object to sending the alternates into the jury room." Gov't. Pet. at 13. Similarly, the government criticizes the court of appeals' decision, and argues review should be granted, because the court of appeals ruled that even though the attorneys consented to the error, attorney consent was not sufficient to vitiate the error; personal consent of the defendant was required. Gov't Pet. at 15 ("In order to forfeit the Rule 24(c) claim, the court of appeals held, the defendants had to consent to the procedure personally. There is no sound basis for that holding.")

Thus, all of the reasons the government presents as to why the petition for review should be granted rest on the critical assumption that there was no objection by the defense to the alternate juror deliberation error. The government is particularly adamant that review should be granted and a reversal ordered because defense counsel consented to the procedure. Taking the government's argument at face value, if there was an objection to the procedure by defense counsel, then there is no basis for review by this Court.

**B. Mr. Gray's Attorney Specifically Objected To The Alternate Jurors Being Allowed In The Jury Room During The Deliberations**

As the court of appeals explains in its decision, "before the conclusion of the trial, the district judge suggested that the two alternate jurors be allowed to remain with the jury during deliberations, unless the parties had an objection." Pet. App. 5a (footnote omitted). As the court went on to explain:

The following day, the court asked defense counsel "whether you want the alternates to go in and not participate." Olano's counsel responded, "We would ask that they not."

Pet. App. at 5a (quoting the trial transcript).

Although the opinion attributes this objection to counsel for defendant Olano, it was actually stated by attorney Kent Robison, counsel for defendant Gray, not defendant Olano. See Trial Transcript at 10609.

The opinion further notes that on the day following this objection, the district court again raised the question by inexplicably asking "You do all agree that all fourteen deliberate? Okay. Do you want me to instruct the two alternates not to participate in the deliberation?" Pet. App. at 6a. The attorney for defendant Hilling then stated: "That's what I was on my feet to say." *Id.*

In deciding that the alternate juror error required reversal, the court of appeals noted that "the record shows that neither Olano or Gray ever gave his personal

consent to the presence of the alternates during the jury deliberations. Moreover, the record is unclear with regard to the question of whether counsel for either defendant ever specifically consented to the waiver, although counsel for appellants' co-defendant certainly did." Pet. App. at 27a. In ultimately ruling that the personal consent of the defendants was required, the court "assume[d], *arguendo*, that co-defendant's counsel spoke as counsel for all defendants on this issue." *Id.*

The court of appeals cited no basis for its assumption that the consent of one attorney for a different defendant should be, or could be, held binding on another counsel or another defendant. A transference of consent on such an important question as juror deliberations is particularly inappropriate and unjustified as applied to Mr. Gray, since the only time his attorney addressed the issue, he asked that the alternates *not* be allowed in the jury room during deliberations.

The record simply does not support review of the question presented by the government. This Court's review should not be premised on the same undocumented and unjustified transfer of consent employed by the court of appeals.<sup>6</sup> Rather, review should be based on

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<sup>6</sup> If the Court were to review the case on this same unfounded assumption, any ruling in favor of the government would have to be accompanied by an order that the case be remanded to the district court to make findings as to whether

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the record as it stands: a specific objection to the procedure by Mr. Gray's attorney, followed by the consent of an attorney for a different defendant for which there is no basis to attribute to Mr. Gray or his attorney. Given this record, the entire basis for the government's requested review – that there was no objection and, in fact, consent to the procedure by defense counsel – evaporates, especially as to Mr. Gray.

### **III. THE GOVERNMENT'S CLAIMED CONFLICT AMONG THE CIRCUITS IS ILLUSORY**

The government argues review should be granted because there is a conflict among the circuits "on the question of whether a violation of Rule 24(c) is reversible error per se." Gov't Pet. at 7. There is only a conflict because the government combines together all Rule 24(c) cases as if they all addressed the same type of error; they do not. Once the cases are separated by the nature of the Rule 24(c) error, the conflict disappears.

#### **A. The Types of Rule 24(c) Errors**

Rule 24(c) requires that alternate jurors shall be discharged when the regular jurors retire to begin their deliberations. A review of the case law illustrates that a violation of Rule 24(c) may result in a number of distinctly different types of error. First, an alternate juror

who has not been discharged might be kept apart from the regular jurors during deliberations. See, e.g., *United States v. Rubio*, 727 F.2d 786, 799 (9th Cir. 1983). Second, an alternate juror who has not been discharged might be substituted for a regular juror after deliberations have commenced, and at that time made a regular juror with authority and responsibility for deciding the case. See, e.g., *United States v. Kaminski*, 692 F.2d 505, 518 (8th Cir. 1982); *Leser v. United States*, 258 F.2d 313, 317 (9th Cir.), petition for cert. dismissed 385 U.S. 802 (1966). Third, an alternate who has not been discharged might be made a regular juror when deliberations commence, thereby effectively increasing the size of the jury. See, e.g., *United States v. Reed*, 790 F.2d 208, 210 (2d Cir.) cert. denied 479 U.S. 954 (1986). Fourth, an alternate who has not been discharged might be present during the deliberations of the regular jurors, even though the alternate is never made a regular juror and is not charged with responsibility for deciding the case. See, e.g., *United States v. Beasley*, 464 F.2d at 469.

In the present case, it was the fourth type of error which occurred; the alternate jurors were not discharged and were then allowed to be present during the deliberations of the regular jurors. This type of error is different, and more prejudicial, than the other types of Rule 24(c) error, because it results in a violation of the jealously guarded sanctity of juror deliberations. See *United States v. Watson*, 669 F.2d 1374, 1390-91 (11th Cir. 1982); *United States v. Phillips*, 664 F.2d 971, 995 (5th Cir. 1981) (discussing *United States v. Lamb*, 529 F.2d 1153, 1160 (9th Cir. 1975) (en banc) (Wright, J. dissenting)).

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the consent of the attorney for co-defendant Hilling constituted consent by Mr. Gray's attorney, especially in light of his earlier objection.

**B. There Is No Conflict Among The Circuits Once The Cases Are Examined According To The Type Of Rule 24(c) Error**

In making its "conflict among the circuits" claim, the government groups together cases from all four categories into one category. Gov't. Pet. at 7-9, citing, *inter alia*, *United States v. Reed*, 790 F.2d at 209-10 (alternate juror not discharged and made into a regular juror, thereby resulting in a 13 person jury); *United States v. Kaminski*, 692 F.2d at 518 (at request of defense, alternate not discharged and later substituted in as regular juror with personal consent of each defendant); *United States v. Phillips*, 664 F.2d at 990 (alternate juror not discharged and held separately from other regular jurors until later substituted in as regular juror).

What the government fails to recognize, however, is that the question of whether a "Rule 24(c) violation is reversible error per se" is *not* a function of the circuit where the case is decided, but rather the type of error.

The court of appeals in this case did not reverse simply because there was a violation of Rule 24(c); the unanimous panel reversed because at least one of the alternate jurors was allowed in on the deliberations from start to finish.<sup>7</sup> Those deliberations should have been private and secret among those persons who were to be held accountable for, and were morally responsible for, deciding the defendants' fate.

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<sup>7</sup> One of the two alternates asked to be excused during the deliberations and was apparently permitted to leave.

None of the cases cited by the government to be in conflict with this holding involve this type of Rule 24(c) violation.<sup>8</sup> That different courts have ordered different remedies for different types of Rule 24(c) errors does not mean that there is a conflict among the circuits; rather, any claimed conflict is the result of the failure to properly categorize different cases. Indeed, while the government attributes to the Ninth Circuit a rule of automatic reversal for Rule 24(c) violations (Gov't Pet. at 9), the Ninth Circuit does not require reversal where Rule 24(c) is violated but the alternates are not allowed in the jury room during deliberations. See *United States v. Rubio*, 727 F.2d at 799.

The government's claimed conflict is manufactured, as part of a thinly veiled attempt to have a case that would otherwise be considered routine, turned into a "cert worthy" case so the government can avoid an embarrassing loss. Legal analysis, not review by this Court, is needed to resolve the conflict presented by the government.

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<sup>8</sup> The government does cite two cases in which alternate jurors were not discharged and were allowed in the jury room during deliberations and were not later substituted as regular jurors. See *United States v. Jones*, 763 F.2d 518 (2d Cir.) cert. denied 474 U.S. 981 (1985); *United States v. Watson*, 669 F.2d 1374 (11th Cir. 1982). In each of those cases, however, the alternate jurors remained in the jury room for only a short period of time before they were ordered removed (an hour and a half in *Jones*, 763 F.2d at 522, and thirty five minutes in *Watson*, 669 F.2d at 1389). In contrast, in the present case, one of the alternates remained with the regular jurors throughout the deliberations until the verdict was reached.

**IV. THE COURT OF APPEALS DECISION TO REVERSE WITHOUT REQUIRING THE DEFENDANTS TO PROVE ACTUAL PREJUDICE WAS CORRECT; THE DECISION IS CONSISTENT WITH THE PRINCIPLE THAT A DEFENDANT SHOULD NOT BE REQUIRED TO SHOW PREJUDICE WHERE THE NATURE OF THE ERROR MAKES SUCH A SHOWING IMPOSSIBLE**

The government argues that review should be granted because the court of appeals' decision ordered a reversal without a showing of prejudice "and there are very few errors that should result in automatic reversal of a criminal conviction absent a showing of prejudice to the defendant." Gov't. Pet. at 9 (citations omitted). In asserting that the error here was of a type for which automatic reversal is inappropriate, however, the government relies on a "straw man" argument – it says the error involved jury size and then explains how such an error cannot be inherently prejudicial. The court of appeals' decision to reverse without requiring a showing of prejudice, however, was not based on jury size. The error which warranted automatic reversal was the intrusion of the privacy of the jurors and the secrecy of their deliberations by persons who were not held accountable for the decision to be made. Since it is impossible to show prejudice from this indisputably serious error, it is precisely the type of error for which this Court has recognized a per se reversal is appropriate.

**A. The Error Requiring Reversal Without A Showing Of Prejudice Was Not A Violation Of The "Rule of 12" But A Violation Of The Privacy And Secrecy Of The Deliberating Jurors**

The government, in criticizing the court of appeals' decision for reversing without a showing of prejudice, attempts to make it appear that the court did so based on a violation of the "rule of 12" (i.e., the jury must be comprised of 12 persons, neither more nor less). See Gov't. Pet. of 10-11. The government first notes that the court of appeals, in characterizing the error as "inherently prejudicial" and one which "infringes upon the substantial rights of the defendant," cited to the Fourth Circuit's decision in *United States v. Virginia Erection Corp.*, 335 F.2d 868 (4th Cir. 1964). See Gov't Pet. at 10. The government then focuses on that part of the opinion in *Virginia Erection* which expressed the view that the Constitution requires a jury of 12 persons in criminal cases, "neither more nor less." 335 F.2d at 870.

Having thus linked the court of appeals' characterization of the error in this case as "inherently prejudicial" with the rule of 12 principle discussed in *Virginia Erection*, the government proceeds to point out that the Constitution is no longer read as requiring a jury of twelve. Gov't Pet. at 10-11, citing, *inter alia*, *Williams v. Florida*, 399 U.S. 78 (1970). The government completes its criticism of the court of appeals' automatic reversal by asserting that since a violation of the rule of 12 does not violate a "substantial right" of the defendants, such a violation cannot be inherently prejudicial and cannot support a reversal without a showing of prejudice.

The government's observations about the rule of 12 principle are correct, but they are also irrelevant. The court of appeals did not cite to the *Virginia Erection* opinion for the proposition that a jury must be 12 persons, but rather the opinion's explicit recognition in that case of "the cardinal principle that the deliberations of the jury shall remain private and secret in every case." Pet. App. at 28a, quoting *Virginia Erection*, *supra*, and Fed. R. Crim. P. 23(b) (1990 ed.) (Advisory Committee Notes to 1983 Amendment). It was this error – the intrusion upon the "jury's privacy and the secrecy of the jury process" – which the court of appeals ruled justified reversal without a showing of prejudice, and not the straw-man rule of 12 error. Pet. App. at 28a.

**B. The Nature Of The Error Makes It Impossible To Prove Prejudice And Therefore The Court Of Appeals Decision To Reverse Without Requiring The Defendants To Establish Prejudice Is Appropriate And Consistent With The Decisions Of This Court**

Once it is recognized that the decision to reverse without a showing of prejudice was based on the jury deliberation error, and not as the government suggests, a jury size error, the government's argument that the decision is inconsistent with this Court's pronouncements on per se reversible error is without support.

There is no dispute that allowing the alternates to be present during the deliberations of the regular jurors was a flat-out violation of Rule 24(c) of the worst sort. Nor can there be any reasonable dispute that this error is potentially prejudicial. As the court of appeals correctly

recognized, and as other courts have recognized previously, a violation of the jury's privacy and the secrecy of its deliberations by the presence of persons not assigned responsibility for deciding the case, can have numerous, even if sometimes subtle, effects on the jurors' deliberations and ultimate decision. See Pet. App. at 29a; *United States v. Lamb*, 529 F.2d 1153, 1160 (9th Cir. 1975) (*en banc*) (Wright, J., dissenting); *Virginia Erection*, 335 F.2d at 872; see also Fed. R. Crim. P. Rule 23(b) (1990 ed.) (Advisory Committee Notes to 1983 amendment). Certainly there is no basis for assuming that the error had no effect.<sup>9</sup>

While prejudice is virtually inevitable, it is not possible for a defendant to demonstrate, or for a court to determine, whether the presence of unauthorized persons during deliberations had an effect on the jury and if that effect were prejudicial. To make such a determination would require exactly the type of intrusive post-verdict interrogation of jurors which has been eschewed by the federal courts. See *Tanner v. United States*, 483 U.S. 107 (1987).

The inability to prove actual prejudice does not mean the error should be overlooked or disregarded. To the

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<sup>9</sup> The government argues that it is possible to assume there was no prejudice because there is no difference between alternate and regular jurors. Gov't Pet. at 13. The error here, however, was not vitiated by the fact that the unauthorized persons present during deliberations were alternate jurors – the alternate jurors were not charged with the solemn responsibility of deciding the defendants' fate and were not made accountable for the decision made. The poll of the jury at the return of the verdicts did not include the alternates. TR: 10822-10823.

contrary, this Court has recognized that where an error is of a type that makes it difficult for the defendant to demonstrate actual prejudice, in the usual requirements for proving prejudice should not apply. *See Cuyler v. Sullivan*, 446 U.S. 335, 349 (1980); *see also, Strickland v. Washington*, 466 U.S. 668, 692 (1984) (discussing when proof of prejudice may not be required). This same principle has been applied to other errors which occur during jury deliberations. *See United States v. Vasquez*, 597 F.2d 192, 193 (9th Cir. 1979) (where extrinsic material is available to jurors during deliberations, reversal is required unless "it can be concluded beyond a reasonable doubt that [the] extrinsic evidence did not contribute to the verdict.").

The defendant agrees with the government that the types of errors which warrant reversal without a showing of actual prejudice have been narrowly limited by this Court. A violation of the rule of 12 is not such an error; a violation of the privacy of jurors and the secrecy of their deliberations through the presence of unauthorized persons from the beginning of the deliberations until the end, is such an error.

#### **V. THE COURT OF APPEALS CORRECTLY RULED THAT PERSONAL CONSENT OF THE DEFENDANT IS REQUIRED TO WAIVE THE RIGHT TO A JURY FREE FROM OUTSIDE INFLUENCE; PERSONAL CONSENT BY THE DEFENDANT SHOULD BE REQUIRED BECAUSE THERE IS NO TACTICAL REASON FOR GIVING UP THE RIGHT AND IT IS SIMILAR TO OTHER RIGHTS WHICH CAN ONLY BE WAIVED BY PERSONAL CONSENT OF THE DEFENDANT**

The government's final point is that review should be granted because the court of appeals incorrectly ruled

that personal consent of the defendant was required to vitiate the error which occurred here.<sup>10</sup> Gov't pet. at 13-17. According to the government, the vast array of strategically based trial decisions are allocated to counsel and the decisions which must be made personally by the defendant are few in number. Gov't Pet. at 15-16. Thus, the government asserts that "[t]he decision to permit alternate jurors to retire with the regular jurors during deliberations is not the sort of 'fundamental' trial decision that the defendant must make personally." Gov't Pet. at 17.

Once again, the defect in the government's argument is its failure to recognize the true nature of the error which resulted in the court of appeals reversal.

Contrary to the government's assertion, the decision at issue is not whether "to permit alternate jurors to retire with regular jurors . . ." Gov't Pet. at 17. Rather, the decision is whether to give up the right to have a jury that is not subject to outside influence. It is because of the

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<sup>10</sup> This argument necessarily rests on the assumption that the defendants' attorneys consented to the erroneous procedure. If the attorneys did not consent, then there is no reason to reach the question of whether the personal consent of the defendants is required. As discussed above, the record provides no basis to assume that the oblique statements of the attorney for co-defendant Hilling constituted consent by other counsel, especially since Mr. Gray's counsel did object to the procedure on the one occasion he addressed the issue. *See Section II, supra.* Nevertheless, for purposes of responding to the government's contention that the court of appeals erred in requiring the personal consent of the defendants, it will be assumed that the attorneys consented to the erroneous procedure.

nature of this right that Rule 24(c) is stated in mandatory language, and does not even allow a waiver of the right under any circumstances. Indeed, there is no apparent benefit to be obtained by a defendant from consenting to a violation of Rule 24(c).<sup>11</sup> See *United States v. Allison*, 481 F.2d 468, 472 (5th Cir. 1973) ("Because any benefit to be derived from deviating from the Rule is unclear, and the possibility of prejudice so great, it is foolhardy to depart from the explicit command of Rule 24.") The government's attempt to characterize this decision as a tactical one is simply unfounded. In fact, the procedure of allowing the alternates to be present during deliberations was not initiated by the defense, but rather was suggested by the district court; the procedure was suggested not because of some potential tactical advantage, but as the district judge explained it, "strictly as a matter of courtesy" to the alternate jurors. Pet. App. at 5a, n.5.

The special nature of the right also makes irrelevant the government's argument that, as a general matter, few trial strategy decisions require the personal consent of the defendant. Gov't Pet. at 15-16. Given that there is no benefit to be obtained by a defendant from consenting to a violation of Rule 24(c), it is hardly persuasive to posit that most strategical decisions are allocated to counsel and do not require the personal consent of the defendant.

<sup>11</sup> Requiring the personal consent of the defendant will have the salutary effect of drastically reducing the number of Rule 24(c) violations; when it is explained to the defendant that there is nothing to be gained from consenting to a violation of Rule 24(c), it is likely that consent will not be forthcoming.

One of the decisions which require the personal, written consent of the defendant is the decision to have a jury of less than 12 decide upon a verdict. This requirement, made mandatory by Rule 23(b), has also been recognized and endorsed by the courts. See *United States v. Reyes*, 603 F.2d 69, 71 (9th Cir. 1979); *United States v. Guerrero-Peralta*, 446 F.2d 876, 877 (9th Cir. 1971); see also *United States v. Taylor*, 498 F.2d 390 (6th Cir. 1974). If the personal, written consent of the defendant is required for a jury of less than twelve, then it is appropriate to require the personal consent of the defendant to a jury that is subject to the influence of others during their deliberations.

A comparison of Rule 23(b) and Rule 24(c) provides still further support for the conclusion that a waiver of the provisions of Rule 24(c) should require the personal consent of the defendant. As noted, Rule 23(b) requires the personal consent of the defendant to have his or her case decided by a jury of less than twelve. In contrast, Rule 24(c) does not permit a waiver under any circumstances. If any logical conclusion is to be derived from this difference between Rule 23(b) and Rule 24(c), it is that an even more stringent standard of waiver should apply to Rule 24(c) errors. If one rule allows for a waiver but says that it must be made personally by the defendant in writing, and a companion rule does not allow for a waiver of its provision under any circumstances, it hardly makes sense to conclude that the second rule can be waived more easily than the first.

If personal consent of the defendant is required when a decision is made to proceed with less than 12 jurors, the same should be required when a court wants to have

alternate jurors sit in on the deliberations of the regular jurors. This is particularly true given that there is a potential benefit to the defendant from consenting to a jury of less than 12, whereas there is no benefit to be derived by a defendant from a violation of Rule 24(c). Given the absence of any strategic benefit to a defendant from consenting to a violation of the Rule, it is appropriate to require that the defendant personally consent to any such violation.

The court of appeals' conclusion that the personal consent of the defendant is required to waive the right to have a jury that is free from the presence and influence of unauthorized persons appropriately recognizes the special nature of the right at issue. Further, the court's rule will contribute dramatically to the prevention of such errors in the future, and it is consistent with the division of responsibility between counsel and client in other areas of criminal procedure.

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#### **CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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